NO. 48468-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNY EUGENE BAIER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00420-2

BRIEF OF RESPONDENT

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SERVICE		
	Lisa Elizabeth Tabbut Po Box 1319 Winthrop, WA 98862 Email: ltabbutlaw@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 17, 2016, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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   a. Whether the alleged hearsay was testimonial and thereby violated the confrontation clauses of the United States Constitution and Washington Constitution?

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2. Whether sufficient evidence supported the conviction?

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kenny Eugene Baier was charged by amended information filed in Kitsap County Superior Court with one count of delivery of controlled substance with school bus zone special allegation and one count of selling drugs for profit also with a school bus zone special allegation. CP 9.

The case involved a controlled buy of drugs and the state's confidential informant (CI) did not testify. Detectives were seeking the CI

even as the case was called to trial. RP, 11/17/15, 14. Pretrial, the defense argued that hearsay comprised of statements by the CI while she arranged the drug deal should not be admitted. CP 13-15 (defense memorandum); RP, 11/17/15, 18 *et seq.*(arguments of counsel). The trial court ruled, first, that "the CI's statement identifying the defendant as a person from whom she could get drugs cannot be admitted, that is hearsay." RP, 11/18/15, 60. Second, however, the trial court allowed limited testimony on the point:

> I think it's fair to allow the Detective to say that she overheard the CI making arrangements pursuant to the Detective's directive, because that would not be offered for the truth. Instead, it is offered to show why the Detective did the next thing that they did, which is to drive to Bremerton.
>
> And then of course after that, she can testify with respect to her observations. So I'm going to place that limitation.
>
> So she can summarize the statements to the effect that she overheard the CI, quote, making arrangements, end quote, that it was pursuant to the Detective's directive, which the Detective can talk about of course.

RP, 11/18/15, 61.

The jury convicted Baier of both counts. CP 16. The jury also gave affirmative answers to each of the school bus zone special allegations. CP 17-18. The substantive crimes merged and Baier was given a standard range sentence on the delivery count. CP 19-28 (judgement and sentence). As a condition of community custody, the trial court imposed the condition that Baier can "enter no bar or place where

alcohol is the chief item of sale." CP 24.

The present appeal was timely filed.

B. FACTS

The state agrees with Baier that the case involved a "standard controlled buy" of drugs. Brief at 4. The heart of the state's case was the testimony of Kitsap County Sheriff Detective Krista McDonald. RP 11/18/15, 94. Detective McDonald has 19 years of law enforcement experience (Id. at 95) and 15 years with the Kitsap County Sheriff's Office. Id. at 96. She presently works with informants in the special investigation unit. Id.

Detective McDonald conducts a typical controlled buy by meeting an informant in a secure location, discussing their plan and who the target is, searching the informant for contraband or money, providing prerecorded buy money, and proceeding to the location established by the informant's contact with the target. RP, 11/18/15, 98-100. At least four law enforcement officers are involved for surveillance of the scene of the buy. Id. at 100-101.

In the present case, one Ashely Hall had been recruited to work as a CI. RP, 11/18/15, 101. She had been arrested and booked and Detective McDonald and another detective interviewed her in the jail. Id. at 102. She agreed to work as an informant. Id. Ms. Hall did just one controlled

buy because she violated her contract by becoming difficult to contact; reliability in staying in contact with the officer "is a key factor in being on contract." Id. at 104.

On the occasion relevant to this case, Detective McDonald, accompanied by Detective Bowman, picked up Ms. Hall and they drove to a secure location. RP, 11/18/15, 105. Next,

> I directed her to make arrangements to do a controlled purchase of narcotics. And once that arrangement was made, I searched her person to make sure that there was nothing on her and then her purse was also searched.
>
> After confirming that there was no narcotics on her, there was no cash on her, and no paraphernalia, she then was provided money for the controlled buy.

Id. at 106. Detective Bowman did not testify to any facts having to do with the arrangements made for this controlled buy. In his testimony, Detective Bowman recounted picking up the CI and then explained the search of the CI. RP, 11/20/15, 215.

Ashley Hall was under surveillance of law enforcement from the time of the search until the buy was completed. Id. at 108. After arrangements were made and Ms. Hall was searched, she and the two detectives proceeded to a Dairy Queen parking lot across the street from a Winco parking lot. Id. at 108. Ms. Hall left the car and crossed the street to the Winco parking lot. Id. at 109. Ms. Hall made contact with a vehicle in the Winco parking lot; Baier was recognized as the passenger in that car by surveilling police. RP, 11/20/15, 200. Pictures of Baier and the car he

arrived in were taken by surveillance officers. Id. (surveillance pictures admitted as state's exhibits 2-28). Surveillance officers observed the CI approach the car, have a brief discussion with Baier, and then "the two exchanged something through the window." RP 11/20/15, 202. State's exhibits 18 and 20 were admitted and show Baier and the CI reaching toward one another's hands preparatory to an exchange. Id. at 203. Then, Ms. Hall returned to Detective McDonald's location and gave her "narcotics, heroin." RP, 11/18/15, 110-11; RP 11/20/15, 218.

The heroin was admitted as state's exhibit 29. RP, 11/19/15, 170. The narcotics tested positive for heroin. RP, 11/19/15, 173.

III. ARGUMENT

A. NO HEARSAY FROM CI ASHLEY HALL IS FOUND IN THE RECORD.

Baier argues that inadmissible hearsay was allowed and tainted the verdict as such and also caused a violation of Baier's confrontation rights. This claim is without merit because no statement by Ms. Hall was admitted at trial. The alleged hearsay was Detective McDonald's testimony that she directed Hall to make arrangements to purchase narcotics and that such arrangements were made; Baier never directly says so in his brief. The above quoted statement was the object of argument pretrial. In any event, the question of whether or not a statement is

hearsay is reviewed de novo. *See State v. Gonzalez-Gonzalez,* 193 Wn. App. 683, 688-89, 370 P.3d 989 (2016). Also, the standard of review on a confrontation clause issues is de novo. *State v. Kirkpatrick,* 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

1. The issue was not preserved for appeal.

After the trial court ruled on the hearsay issue, defense counsel maintained that anything related to the contact Ms. Hall made in arranging the narcotics buy violated confrontation because he had not cross-examined Ms. Hall. RP, 11/18/15, 63. The defense had essentially prevailed on it's in limine hearsay challenge and actual statements by Ms. Hall had been excluded. But defense counsel did not couch his confrontation clause misgivings as a continuing objection. *But see State v. Powell,* 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995) (party that lost motion in limine has standing objection on the issue). More importantly, defense counsel did not, at that point, complain that the trial court's limitation of the evidence left hearsay behind, which of course would be the reason for a confrontation objection. When Detective McDonald testified regarding the "arrangements" no objection was lodged. *See* RP, 11/18/15, 106. This because it is obvious that actual hearsay had been excluded. Baier's failure to object under these circumstances left the hearsay issue unpreserved. ER 103 (a) (1) (timely objection "stating the

specific ground of objection" is required.).

However, in candor, the state argues here that the hearsay issue was not preserved and this is true. It may be an open question whether Baier must similarly preserve his confrontation issue. Baier's confrontation clause argument has been held to be an issue of constitutional magnitude and as such may be raised for the first time on review. *See State v. Hudlow,* 182 Wn. App. 266, 277, 331 P.3d 90 (2014). But to the contrary is *State v. O'Cain,* 160 Wn.App. 228, 279 P.3d 926 (2012). There, the United States Supreme Court was quoted: "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence. . ." Id. at 237, *quoting Melendez-Diaz v. Massa chusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In a long discussion of Justice Scalia's opinion in *Melendez-Diaz,* the *O'Cain* court held:

> "Most important is the clear statement that "[t]he defendant always has the burden of raising his Confrontation Clause objection." "Always" means always. It means every time. It means without exception. And it means always, every time, without exception, in the trial court."

Id. at 239 (internal quotation by the court). One good reason for this rule is "were this not the defendant's burden, the trial judge would be placed in the position of *sua sponte* interposing confrontation objections on the defendant's behalf—or risk knowingly presiding over a trial headed for

apparent reversal on appeal." Id. at 243. Candor again requires that we note that the *O'Cain* case and the United States Supreme Court cases there discussed refer to meeting the requirement either at trial or *pretrial* and nowhere analyses the difference, if any. Here, the issue was raised pretrial. But no objection was had when the evidence was offered and the evidence was offered in the limited fashion ordered by the trial court, which ruling was intended to address both hearsay and confrontation problems. In defense counsel's further pretrial objection, he does not explain why the trial court's limitation ruling is insufficient with regard to confrontation. On this record, Baier should be required to preserve his objection at the time the evidence was offered. If not, the trial court is placed in that untenable position of having to do so itself *sua sponte.* This court should hold that the issue was not preserved.

2. Detective McDonald's testimony contained no hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801 (c). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801 (a). A "declarant" is "a person who makes a statement." No more than the plain language of the evidence rule is required in order to evaluate the present claim.

In this case, there simply is no statement by a non-testifying declarant in the record. No oral or written statement by Ms. Hall was introduced. No nonverbal conduct intended as an assertion was admitted. Further, Detective McDonald's testimony made no reference to Ms. Hall's actual behavior on this point. She did not say that the arrangements were made by phone. She did not say who Ms. Hall arranged with; there was no reference to Baier in that bit of testimony. She did not give details of the arrangements such as type or quantity of drugs or purchase price. She did not, contrary to Baier's assertion in his brief (Brief at 10), testify that she directed Hall to "buy heroine"; she said "buy narcotics." RP, 11/18/15, 106. What she did do is describe her personal observation that arrangements were made for a "standard controlled buy" as Baier puts it.[1]

But, without engaging in any analysis of the actual testimony or the definitions found in the hearsay rule, Baier asserts that this is "backdoor hearsay." Brief at 11. In this wise, Baier relies on *State v. Martinez*, 105 Wn. App. 775, 20 P.3d 1062 (2001). Baier relies on the rule found there that "[i]nadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." Id. at 782.

In *Martinez*, detectives testified to a number of direct quotes by the

[1] Baier basically concedes this in noting that Detective McDonald was with Hall "when

person arranging the delivery of an ounce of cocaine. The portion of the police testimony analyzed by the court was an exchange between the police and the arranging person that a vehicle arriving was the target of the operation or that a person in the vehicle, one Ramon, was the target. Again, actual quotes were allowed by the trial court as present sense impressions under ER 803 (a) (1). This Court rejected the trial court's rationale for admissibility and held that the statements by the out-of-court declarant, the person making the arrangements, constituted hearsay. Id. at 784-85. Moreover, this holding applied to two officers whose testimony was essentially to their understanding of the declarant's assertions after talking to the declarant or the other detective. Id. The confrontation clause analysis in *Martinez* bottoms on the fact that actual quotes or direct reference to the statements of the non-testifying witness were admitted over defense objection (and that, obviously, the defense could not cross-examine the non-testifying declarant).

Baier also relies on *U.S. v. Check*, 582 F.2d 668 (2d Cir. 1978). There, the government's informant refused to testify. The prosecutor sought to avoid hearsay problems by having an under-cover officer relate various aspects of his attempt to purchase drugs by not saying what the informant said but by testifying as to what he, the under-cover officer, said

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she made the arrangements via a cell phone call." Brief at 10.

back to the informant. This artifice result in the under-cover officer testifying that

> I after we had the conversation, I instructed William Cali that by no means did I intend to front any sum of money to Sandy Check, I didn't particularly care for the fact that initially he was supposed to come with an ounce of cocaine, and the taste which he had, which I was supposed to get prior to making the ounce buy of cocaine, was at his house, and due to the fact that it wasn't of good quality, I wasn't particularly concerned, as good faith wasn't being shown to me, especially for the fact I also told William Cali I had no intentions of giving Sandy Check $300 which William Cali owed to him from a previous narcotics deal.

And, later

> At that time I told William Cali I didn't particularly care whether or not Check was concerned about rats and not wanting to meet anyone new or about being busted by the man, and I had again still no intention of fronting any money or the $300 which Cali owed him.

And, still more

> I told William Cali at the time I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor the fact that it was supposed to come from a captain of Detectives; I had again still no intention of fronting any money to him, the $1,200 for the ounce of cocaine or the $300 which William Cali owed to him.

582 F.2d at 671 (citation to record omitted). It goes on and on. (*see* the summary at 582 F.2d at 678). It can be observed that by the artifice of having the officer testify to what he said in response to what the informant said, the entire conversation was elucidated. Check argued that "Spinelli [the under-cover officer] actually was on numerous occasions throughout his testimony in essence conveying to the jury the precise substance of the out-of-court statements Cali [the informant] made to him." Id. at 675

(alteration added).

The United States Court of Appeals agreed with Check, saying "it was not only obvious that Spinelli was conveying to the jury Cali's inadmissible hearsay but it was also just as clear that Check was being substantially prejudiced by that testimony." On these facts, then, the *Check* court made the statement that Baier uses to support his position—"for much of his testimony Spinelli was serving as a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the informant Cali." Id. at 678. It is important to the present case that in the discussion it was held that what the Detective actually said to the informant was not hearsay and he, as the declarant, was available in court to be cross-examined. Id. at 679.

Thus, both *Martinez* and *Check* are distinguished from the present case. In both, one directly and another by artifice, the police witness recounted the actual statements of non-testifying witnesses. The cases follow the United States Supreme Court's position:

> In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.

Davis v. Washington, 547 U.S. 813, 826, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2004). Not so in the present case. Here, the merely passing reference to arrangements being made, asserted as an explanation of the process of the

controlled buy, bear little or no resemblance to the actual out-of-court statements erroneously admitted in the cases. The "arrangements were made" assertion said absolutely nothing about Baier himself and can easily be seen as following from Detective McDonald's observations only.

Neither is *State v. Hudlow*, 182 Wn. App. 266, 331P.3d 90 (2014), the same as the present case on the hearsay/confrontation issue. That case is similar in that it involved a controlled buy using a confidential informant who did not testify at trial (the case even has a buy location at Winco). However, as with *Martinez* and *Check*, the police testimony in *Hudlow* was far more extensive than in the present case and did in fact include the actual statements of the CI in arranging the buy. There, the police witness spoke of the actual phone call, that he listened to the phone call, that the phone call involved arrangements to purchase drugs, the specific type of drug sought (methamphetamine), and the specific place of the buy. Id. at 271-73. In sum, the police witness said essentially all that the CI would have been able to say regarding arrangements for the buy. Under these circumstances, it was held that the testimony was hearsay and admitted to no exception to the hearsay rule. Id. at 281.

In *Hudlow*, it was observed that the characterization of testimony as hearsay depends on the purpose for which the testimony is offered. Thus, "[a] statement is not hearsay if it is used only to show the effect on

the listener, *without regard to the truth of the statement*." 182 Wn. App. at 278 (emphasis by the court), *citing State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). In the present case, Detective McDonald's testimony included, without objection, a general explanation of how controlled buys are done. RP, 11/18/15, 98-100. That testimony included that controlled buys include, rather unremarkably, that the buy must be arranged. Then, she remarked, without any embellishment, that arrangements were in fact made in the present case. The lack of embellishment includes, as noted above, that there was no testimony about how those arrangements were made, no testimony about Baier being involved in the conversation, no testimony as to the time or place of the buy, and no reference as to the type or quantity of drugs sought. The mere fact that making arrangements to buy drugs precedes the buying of them reveals nothing about how the arrangements were made and who said what about whom. Here, the jury could infer no more than that the procedure for a controlled buy as outlined by the police was in fact followed. The effect on the listener, Detective McDonald, is obvious: the buy was arranged so she directed the CI to proceed with the buy. In a sense, the evidence is for the truth that arrangements were made but it is in the final analysis but a truism that one does not buy drugs unless and until one arranges to do so.

In *State v. Chenoweth*, 188 Wn. App. 521, 354 P.3d 13 (2015), the Court considered hearsay of the victim's statements that was repeated by four different witnesses. Id. at 532. Since the victim's disclosures were not close in time to the event, the Court rejected admissibility under the fact of the complaint doctrine. Id. However, the Court noted that none of the witnesses repeated the substance of the allegations and thus

> This testimony was not offered for the truth of the allegations, but to show what the witnesses did next and to provide a basis for their testimony. At his mother's suggestion, C.C. contacted Adult Protective Services, he was referred for a mental health evaluation, and he told the mental health assessor that he had been sexually abused by his father. The case was then referred to the police and assigned to a social worker, who determined that he was a vulnerable adult. Thus, as in *Iverson [State v. Iverson*, 126 Wn. App. 329, 108 P.3d 799 (2005)] C.C.'s disclosures were not hearsay because they were not offered for the truth of the disclosures, but to give context for the investigation.

Id. at 534. The *Chenoweth* analysis was driven by the sentiment that "[h]ere, there was no testimony about the content of the disclosures, so there was no "truth" to be asserted other than the fact that C.C. disclosed the allegations." Id. at 534-35 (quotation by the court). But, again, the case stands for the proposition that hearsay is admissible or not depending on its use. Showing what a witness did next in the story is a permissible use. See *State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004) ("Out-of-court statements offered for a purpose other than the truth asserted do not qualify as hearsay and are not barred by confrontation clause.").

The *Chenoweth* Court, as seen, relied on *State v. Iverson*, *supra*. There, an officer investigating a protection order violation was greeted at the door by a woman who identified herself as the victim. 126 Wn. App. at 332-333. The victim did not appear at trial and, over defense objection, the officer was allowed to testify that she had identified herself at the residence. On appeal, the issue was resolved by first noting that the trial court had admitted the testimony as not for the truth of the matter. Id. at 336. Further

> The statement was nevertheless relevant to explain why the officers, who were by then aware of the protection order and its contents, then conducted further investigation. When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible. *See, e.g., State v. Williams*, 85 Wash.App. 271, 280, 932 P.2d 665 (1997) (holding that officer's statement to another that he smelled alcohol on the breath of the defendant was not offered to prove the truth of the matter, but to show why the officer then requested the defendant to perform a Breathalyzer test, and was not inadmissible hearsay). Thus, the court did not err in admitting the woman's self-identification for the limited purpose of showing that she did so and to help explain the officers' subsequent investigation.

Id. at 337. Significant in *Iverson* is that the state's case would certainly have been insufficient without evidence that the protected person was then present. The hearsay was the only evidence that Iverson contacted the protected person and thus proved an element of the offense. In the present case, Detective McDonald's statement did nothing but show the procedure she was following and explained why she did what she did next.

The arrangements were also admissible as showing "the existence of a Design or Plan to do a specific act [which] is relevant to show that the act was probably done as planned." *State v. Smith,* 85 Wn.2d 840, 854, 540 P.2d 424 (1975) (alteration added); *see also* ER 803 (a) (3). Here, the controlled buy was the plan or design of Detective McDonald and the CI and the testimony here at issue did no more than show that that act, the controlled buy, was done as planned.

The trial court correctly ruled that the "arrangements" testimony was admissible to show what happened next, not for the truth of the matter. RP, 11/18/15, 61. In this use, the testimony is not hearsay. The cases cited by Baier involve direct or nearly direct repetition of an informant's words. Here, none of the informant's words were used. On this record, the brief testimony served merely to complete the story of the under-cover police operation. Given that purpose, it is at least difficult to see how Detective McDonald's testimony can be seen as hearsay and equally difficult to find prejudice to Baier's case. *See* harmless error analysis *infra* at.

B. THE TESTIMONY IN ISSUE WAS NOT HEARSAY AND THUS NOT TESTIMONIAL AND DID NOT OFFEND BAIER'S CONFRONTATION RIGHT .

Baier next claims that the alleged hearsay violated his right to

confront the witnesses against him. This claim is without merit because the evidence was not asserted for the truth of the matter, was therefore not "testimonial," and was therefore not a violation of the confrontation clause.

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The confrontation clause "applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' " *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It "bars 'admission of testimonial statements of a witness who did not appear at trial unless' the witness 'was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' " *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (*quoting Crawford*, 541 U.S. at 53–54, 124 S.Ct. 1354). Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment subject only to the rules of evidence. *Davis*, 547 U.S. at 821, 126 S.Ct. 2266.

State v. Pugh, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington,* 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2de 224 (2006).

The present case is a classic example of "other hearsay," which was limited by traditional evidence rules and does not offend the confrontation clauses of the United States and Washington constitutions. *Davis* dealt with police interrogation which the United States Supreme

Court finds "testimonial" under any definition. Id. at 822. *Davis* fleshes out what "testimonial" means in the context of police interrogation, holding that if the statement was made under circumstances objectively indicating that the purpose of the questioning was to address an ongoing emergency, it is not testimonial. Id. at 822. An important distinction was made by the *Davis* court: that in *Crawford* the hearsay declarant was subject to relatively calm questioning at the police station after the event but in *Davis,* where the primary purpose of questioning was to meet an ongoing emergency, the non-testifying declarant "was not acting as a *witness;* she was not *testifying.* "547 U.S. at 828 (emphasis by the court).

The present case is difficult to squeeze within the *Davis* rule—there was no interrogation; there was no emergency. *See State v. Pugh, supra.* But the core idea remains. In the present case, Detective McDonald directed Ms. Hall to make arrangements and such was done. As argued repeatedly above, there was no reference to any statement by Hall or Baier or any reference to Baier at all. And, two other core ideas from *Davis* apply here: first, that an admissible emergency call for help ends when that purpose is achieved and therefore part of the focus is on the purpose of the police behavior or questioning not unlike the purpose analysis engaged in determining the admissibility of hearsay in the first instance. 547 U.S. 828. Second, a trial court presented with such a

problem "should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence." Id. at 829.

These two ideas militate for admission in the present case. First, the purpose of Detective McDonald was neither to interrogate to discover facts of a previously committed crime nor to respond to an ongoing emergency. Neither side of the *Davis* case is implicated. The innocuous purpose of the evidence was to complete the story of the conduct of the under-cover police operation, not to expose evidence of guilt. The trial court made this clear in its ruling that the testimony was admitted simply to show what the police did next. RP, 11/18/15, 61. Further, following the command of the Supreme Court, the trial court excluded the actual testimonial assertions of Ms. Hall. What remained was very limited testimony, by a witness then and there subject to cross examination, and admitted for a purpose other than for the truth of the statements.

The purpose of the testimony test is found in *United States v.Cromer,* 389 F.3d 662 (6th Cir. 2004). There it was held that *statements* of confidential informants are testimonial. Id. at 675. The purpose test is there stated as

> The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the

> declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

Id. *But see State v. Koslowski,* 166 Wn.2d 409, 432, 209 P.3d 479 (2009) (emotional state of victim who is speaking to the police not dispositive on confrontation issue). It is apparent from this that the cases do not well cover the present facts. Although it is apparent that the entire police controlled buy procedure was aimed at prosecuting Baier, it remains that Ms. Hall's statements themselves were not admitted. That the intention was to capture Baier selling drugs will always be the case. But that does not mean that police testimony not asserted for the truth of the matter but rather to explain the steps in the police procedure will always offend confrontation.

> For instance, in *Cromer,* one of the exchanges in issue was
>
> Q ....Were you in charge of the investigation that led to charges against Sean Cromer?
>
> A Yes.
>
> Q What was your role in that?
>
> A My partner and I, Officer Galloway, back in January of 2001, had information about 3284 Buchanan. And we began an investigation about this residence being associated with selling drugs.
>
> Q By investigating the place, did you come up with enough information that a state court judge gave you an order to go and have the place searched?
>
> A Yes.

Id. at 675. The passage discusses information received from an

unidentified source. But the court found that it did not offend the Confrontation Clause. Id. at 676. The court noted that "[t]his exchange at least arguably did not even put before the jury any statements made by the CI." Id. Further, "Cromer's confrontation right was not implicated because the testimony was provided merely by way of background." Id. And, as the trial court ruled in the present case, "[t]he Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id., *quoting Crawford v. Washington, supra.* Finally, on all fours with the trial court in the present case, "[a]ny out-of-court statements alluded to by O'Brien at this juncture served the purpose of explaining how certain events came to pass or why the officers took the actions they did." Id.

This holding stands in stark contrast to a second passage in which the defendant, Cromer, was identified (by the nickname "Nut") as the target of the police on information received by the informant. Id. at 676-77. This was a violation. And the *Cromer* court aptly distinguished the two passages

> O'Brien's testimony about "Nut" is distinguishable from her earlier background testimony for several reasons. Not only did the testimony about "Nut" more clearly place before the jury information provided by a CI, but this second category of testimony also implicated Cromer in a way that went "to the very heart of the prosecutor's case." *Stewart*, 528 F.2d at 86 n. 4. In the earlier testimony, O'Brien had merely stated that she "had information" about the Buchanan residence that led her to begin an

> investigation. O'Brien thus alluded, in the vaguest possible terms, to the statements made to her by a CI; she also manifestly linked those out-of-court statements with action taken by her and her partner. Furthermore, that brief explanation for why the government began its investigation of the Buchanan residence at least arguably provided some assistance to the jury in understanding the background of the case.

Id. In our case, Detective McDonald spoke vaguely about arrangements being made and that vague statement was manifestly linked to actions taken by McDonald and her colleagues. Detective McDonald's testimony did no more than tell the jury about the procedure used as the police worked through the protocol of a controlled buy.

1. If testimonial, the admission of the made arrangements testimony here is harmless.

Even if found to be testimonial, admission of the evidence is harmless.

> A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. This court employs the " 'overwhelming untainted evidence' " test and looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt.

State v. Hudlow, supra at 284-85 (internal citation omitted). Here, the allegedly "tainted" evidence is "I directed her to make arrangements to do a controlled purchase of narcotics. And, once that arrangement was made, I searched her person. . ." RP, 11/18/14, 106.

First, it must be noted that Baier argues that "the jury heard that informant Hall made arrangements with someone to purchase drugs—specifically heroin, at a specific place in Bremerton and at a specific

time." Brief at 10 (emphasis added). Further, Baier argues that "the only evidence establishing "[knowledge] that the substance delivered was a controlled substance—heroin" element of delivery and sale for profit—as instructed—was Detective McDonald's account of the substance of the informant Hall's out-of-court statements." Brief at 12. Then, Baier asserts that the only evidence of guilt left is that he was the target of the operation and that he in fact showed up. Brief at 12-13.

With due respect to Baier's argument, the state is perplexed that he can find so much from so little. Nowhere in the allegedly tainted testimony does the detective refer to "heroin." Nor does the passage address time and place in any manner. The allegedly offending passage proves nothing at all about the specific substance sought and thus McDonald's testimony likely proves nothing about Baier's knowledge of anything.

This argument is the more interesting on Baier's assertion that it merely shows that he was the target and that he showed up. That assertion misses one extremely important piece of evidence—that Baier handed an item to Ms. Hall, who returned to and handed the item to Detective McDonald. RP, 11/18/15, 111. The item, of course, was a small piece of heroin. Id. Further, Baier misses that multiple police witnesses watched as this transaction was accomplished. Thus, "without the tainted hearsay" the jury knew, as Baier concedes, that Baier was the target and that he

showed up to the location; but the untainted evidence further shows that he engaged in a hand-to-hand exchange with the CI, that the CI was constantly seen by the police, that the CI provided the lead detective with a piece of heroin, and that the CI did not still possess the buy money after the transaction.

The sufficiency of this untainted evidence is manifest. If we remove the tainted testimony, we still see that Baier delivered heroin to Ms. Hall. Significantly, Baier makes no argument here or below that this untainted evidence had been rebutted at trial. He makes no argument that the substance he delivered to Ms. Hall was not in fact heroin. Whether or not arrangements were made or whether or not anyone testified that there were in fact arrangements made, the delivery itself was observed by multiple witnesses. Pictures of the transaction were taken and admitted at trial. Evidence that arrangements were made for the delivery was purposefully vague and did not prove any element of the offense. Evidence of the delivery, and the substance delivered, was in no way vague, it was unassailable and overwhelming. If it was error to admit the "made arrangements" testimony, that error did not affect the verdict.

C. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

Baier next claims that the evidence was insufficient to establish

guilt. He claims that the evidence fails to establish that he knew the substance delivered was heroin. The state accepts Baier's review of the jury instructions--both do include knowledge that the particular controlled substance involved is heroin. This claim is without merit, however, because under the circumstances of the case, a jury could reasonably infer that Baier knew what the substance was when he delivered it.

On this issue, Baier asserts that "[t]he record contains no direct evidence that Mr. Baier knew heroin was a controlled substance." This may be so, but this argument comes to an assertion that Baier did not know the law, which law decidedly makes heroin a controlled substance. It is a fundamental proposition of criminal law that ignorance of the law is no excuse. *See State v. Warfield,* 103 Wn. App. 152, 159, 5 P.3d 1280 (2000). His assertion of ignorance here provides him no excuse.

In part, however, he is correct. This case relied on circumstantial evidence to establish that element. A challenge to the sufficiency of the evidence is reviewed in a light most favorable to the prosecution and is rejected if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hudlow, supra* at 287, *citing Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). All reasonable inferences are drawn in favor of the state and interpreted most strongly against the defendant. *State v. Garbaccio,* 151

Wn. App. 716, 742, 214 P.3d 168 (2009). In evaluating the evidence, circumstantial evidence is as probative as direct evidence. Id. Further, a reviewing court defers to the trier of fact on issues of "conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Hernandez,* 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

In *Hudlow,* the court addressed this issue saying

> To sustain charges of delivery of a controlled substance, the State need not present direct evidence. "The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other." Rangel–Reyes, 119 Wash.App. at 499, 81 P.3d 157; Green, 94 Wash.2d at 220, 616 P.2d 628. Circumstantial evidence in this case showed Hudlow knew he delivered methamphetamine.

182 Wn. App. at 288. There, circumstantial evidence showed Hudlow's knowledge because he accepted money constituting "a price suitable for the amount of methamphetamine sold..." Id at 288-89. Also, the search of and constant surveillance of the CI, that the CI walked to the appointed location and contacted Hudlow there, and that the CI had no opportunity to recover secreted drugs elsewhere. Further the detectives saw and identified Hudlow and watched a hand-to-hand exchange and a hand shake between the CI and Hudlow. And, finally, the CI returned to the police and handed them the purchased drugs. All these circumstances led to the conclusion that "[w]hile no witness testified he or she directly saw

Hudlow sell the confidential informant methamphetamine, the circumstantial evidence is overwhelming. Id.

The Hudlow Court's factual review is nearly identical to the circumstantial evidence of delivery found in the present case. Here as there, the exact same evidence is overwhelming. Any rationale jury could reasonably infer that Baier knew the substance he was delivery was what it was, heroin. Baier's insufficient evidence argument has no merit.

And, *State v. Ong,* 88 Wn. App. 572, 94 P.2d 749 (1997) provides no support for Baier. There, the defendant had taken a small girl on a long drive when he was supposed to be taking her to school that was only a short distance away. It developed that the girl complained of a headache and Ong gave her one-half of a white pill with numbers on it. Ong knew it was pain medication but did not know it to be a prescription drug because he had stolen it. On appeal, the state's assertion that there was sufficient circumstantial evidence was rebuffed. The court said

> But nothing in this evidence points to knowledge that the substance was morphine rather than any other controlled substance. Thus, even viewed in the light most favorable to the State, the evidence shows only that Ong knew the tablets were a controlled substance, not that the tablets contained morphine.

Id. at 577-78. The Court of Appeals reversed because the state had listed the specific drug morphine in the "to convict" instruction.

The case is clearly different from the present case. There, it is easily seen that a white pill with numbers on it could be any number of things, some of which were not morphine. Here, it is doubtful that a

chunk of street drugs like heroin could be as difficult to identify. There, the fact was that Ong knew the pills were a controlled substance but it was not clear that the pills contained morphin. Here, the chunk of heroin was simply not as ambiguous as the white pill. The jury in the present case could reasonably infer that Baier knew what it was he delivered and the jury did not have to infer that what he delivered was heroin—direct evidence proved this beyond a reasonable doubt. Sufficient evidence supports Baier's conviction.

D. THE TRIAL COURT HAD THE AUTHORITY NECESSARY TO ORDER THAT BAIER NOT FREQUENT BARS OR OTHER ESTABLISHMENTS WHERE ALCOHOL IS THE CHIEF ITEM OF SALE.

Baier next claims that a prohibition on his going to bars is not crime-related and so the trial court was without authority to impose that condition. This claim is without merit because the trial court is statutorily authorized to prohibit possession or consumption of alcohol. Imposition of community custody conditions is reviewed for abuse of discretion. *State v. Cordero,* 170 Wn. App. 351, 373, 284 P.3d 773 (2012).

RCW 9.94A.703 (3) provides that "As a part of any term of community custody, the court may order an offender to…(e) refrain from

possessing or consuming alcohol." That statute goes on to allow "any crime-related prohibitions." Thus the statute differentiates between an alcohol prohibition and other conditions that must be crime-related. Here, the trial court prohibited alcohol possession and consumption as it may in any case. CP 24. In order to give effect to that prohibition, the trial court prohibited attendance at bars or other places where alcohol is a chief item of sale. Thus the condition should stand even though no particular evidence shows that Baier's delivery of heroin happened in a bar or that Baier attended a bar in preparation to so deliver. It is not an abuse of discretion to prohibit bars when a court prohibits alcohol. That condition should stand.

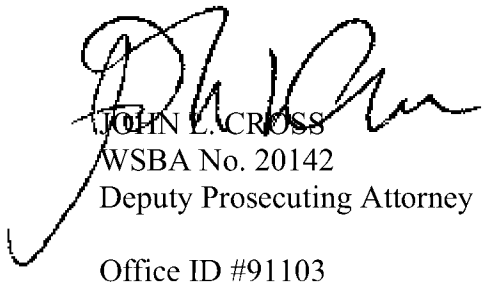
IV. CONCLUSION

For the foregoing reasons, Baier's conviction and sentence should be affirmed.

DATED November 17, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



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